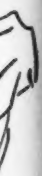
LOS ANGELES BAR BULLETIN

In This Issue

VOL. 28 JANUARY, 1953 No. 4



on
. He
pub-
. an

lay

NY

RNIA

Los Angeles
BAR BULLETIN

Official Monthly Publication of The Los Angeles Bar Association, 241 East Fourth Street, Los Angeles 13, California. Entered as second class matter October 15, 1943 at the Postoffice at Los Angeles, California, under Act of March 3, 1879. Subscription Price $1.80 a Year; 15c a Copy.

VOL. 28 JANUARY, 1953 No. 4

Investigation Committee Report Due

By Stevens Fargo,
President, Los Angeles Bar Association

Stevens Fargo

TOP Association news of the month is the report forthcoming at our meeting on January 22nd from the committee appointed to examine into the field of attorneys' conduct during investigation of un-American activities and in defense of those charged with subversive crime. The committee is composed of William C. Hiscock, Seth M. Hefstedler, Philip F. Westbrook, Jr., and its report will be delivered by its Chairman, Frank B. Belcher.

Recognizing the need for jealous guardianship of a lawyer's prerogatives, most of us have been troubled by the use of such prerogatives by a few whose acts have been widely reported and questioned by the public. I hope this fine committee can help define the line separating personal rights and zealous advocacy from abuse of those precious privileges.

You will be glad to join with me in praising the successful efforts of our Taxation Committee in helping to establish the location in Los Angeles of the office of the District Commissioner of Internal Revenue for this district.

After more than sixty years of existence as an unincorporated Association we shall, by the time this is published, be formed as a non-profit corporation. Our constantly expanding activities make this desirable, and some of our best corporation talent has generously devoted months to study of the shift, including conformance of our By-Laws to the new corporate form. We are especially grateful to Ross Fisher, former Trustee and now State Bar Governor, and Trustees Harold A. Black and Augustus F. Mack, Jr.

Thoughts of Copyright

By Leon R. Yankwich.*

I.
THE ORIGIN OF COPYRIGHT

Leon P. Yankwich

STATUTORY copyright, as it is now known, has its origin in England with the passage of the first copyright act of 1710. (8 Anne, c. 19.) It granted a copyright for a period of 14 years with renewal for 14 years more upon compliance with certain requirements of registration at Stationer's Hall. The rights originally granted were later expanded, both as to duration and character of creations, so that by the English Copyright Act of 1911, the copyright continues for the life of the author and 50 years after his death. (1 & 2 Geo. 5, C. 46, Part I, Sec. 3. See, Copinger and Skone James, The Law of Copyright, 8th ed., 1948, pp. 1-21.)[1]

In the United States, before the adoption of the first copyright act in 1790, several of the states, at the urging of the Colonial Congress and in imitation of the English statutes, passed individual copyright acts. Connecticut and Massachusetts adopted such acts in 1783, giving copyright for a term of 14 years with a 14-year renewal by the authors if they were still alive at the expiration of the term. By 1786, ten other states, *i.e.*, all the remaining states except Maryland, had passed copyright acts for varying durations. The first Congressional act adopted in 1790, gave protection to authors for a period of 14 years with right of renewal for 14 years more. (1 C. J. S., Copyright and Literary Property, Sec. 21; Leon Whipple, Copyright, 1935 4 Ency. Soc. Sci. 401-434; Metro-Goldwyn-Mayer D. Corp. v. Bijou Theatre Co., 1932, 1 Cir., 59 F. (2) 70, 72.)

The codification of 1947 carried over the time limit contained in the 1909 and the previous enactments, namely, *28 years* with a renewal or extension of the copyright by the proprietor thereof in certain instances, and by the heirs of the author in other instances

*Chief Judge, U. S. District Court, Southern District of California. (Author's Note: These observations were delivered by the writer as Presiding Officer at the meeting of the Committee on Copyright of the American Bar Association held at San Francisco, September 13, 1952.)

to a like period of 28 years. (17 U. S. C. A., Secs. 1 *et seq.*) If application for renewal is not made within one year before the original 28 year period expires, the copyright terminates "at the expiration of 28 years from first publication." (17 U. S. C. A., Sec. 24.)

The United States has not adopted the Berne Convention of 1886, or any of its modifications. And the protection which the work of foreign citizens is allowed, is limited to alien authors or proprietors who reside in the United States when the work is published (17 U. S. C. A., Sec. 9(a)), or to foreign citizens of countries which grant to citizens of the United States, the benefits of copyrights on substantially the same basis as its own citizens (17 U. S. C. A., Sec. 9(b)), and are expressed in Presidential proclamations (17 U. S. C. A., Sec. 202.1) or in conventions with the United States (17 U. S. C. A., Sec. 202.3), or treaties or treaty proclamations extending such rights. (17 U. S. C. A., Sec. 202.4.) There is also protection to musical instruments under proclamations and treaties. (17 U. S. C. A., Secs. 202.2 and 202.5.)

At common law, the property right of an author in his manuscript was recognized. (Bobs-Merrill Co. v. Strauss, 1908, 210 U. S. 339, 346-349.) This the law retains. (17 U. S. C. A., Sec. 2.)

The Constitution authorizes the Congress

> "To promote the Progress of Science and usefull Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings and Discoveries." (U. S. Constitution, Art. 1, Sec. 8.)

It is quite evident from the long struggle that has been carried on to broaden these rights, that the emphasis of our legislators has been on the words "limited times." In this respect, we are far behind England. And the refusal to join the Berne Convention has resulted in grave injustices to foreign authors, except in those cases where through treaties and like undertakings they are protected.

II.
THE MORAL RIGHT OF AUTHORS

In one other respect are we behind other countries in protecting the rights of authors. France and other continental European countries have, for a long time, recognized "the moral right" of

(Continued on page 129)

Let Us All Be Frank About Comparative Negligence

By Richard L. Oliver*

Richard L. Oliver

IN A recent article entitled, "Let Us Be Frank About Comparative Negligence," the Honorable William J. Palmer raised various questions and objections to the proposed comparative negligence law which was adopted by the Conference of State Bar Delegates at its last convention.

Judge Palmer is one of our ablest jurists. His questions and objections are entitled to thoughtful consideration by the Bar and to frank and complete answers from those who believe we should have a comparative negligence law.

The adoption of comparative negligence by the Conference of State Bar Delegates was not a sudden impulsive act. On the contrary, it reflects the deliberate and almost unanimous vote of the Delegates which was taken after years of study in previous Conferences and in Special Committees assigned to the subject.

I speak for an association of attorneys who represent injured people in negligence cases and who endorse the progressive action of the Conference of State Bar Delegates. We wish to help bring about this long-needed reform. The present article, of course, does not presume to speak for the Conference of State Bar Delegates, or for any individual delegate.

Judge Palmer's arguments are not new. Opponents of comparative negligence have made similar arguments for years to previous conferences of Delegates and to the Special Study Committees.

Whether comparative negligence is inevitable may be a matter of opinion. That there is a steady trend toward it is a fact. In 1945 comparative negligence was adopted in England, the original home of contributory negligence. Incidentally, not one of the alarming consequences feared by Judge Palmer from the adoption

*Mr. Oliver, a Los Angeles attorney, is President of the Los Angeles Chapter of the National Association of Claimants and Compensation Attorneys.

of comparative negligence has occurred in England during the last seven years.

Comparative negligence is also the law of Canada, Australia, New Zealand, France, Germany, Spain, Italy, Norway, and Sweden. It has been the law of Admiralty for centuries. A few years ago, Congress adopted it in the Federal Employers' Liability Act. Some States have adopted it either completely, as in Mississippi, or in a modified form, as in Nebraska, South Dakota, and Wisconsin. Bills providing for comparative negligence are being considered by the legislatures of various States, including California. Many able jurists, such as Dean Prosser of the University of California, favor comparative negligence.

This trend towards comparative negligence is in response to the basic fact that for our modern automobile age the law of contributory negligence has been tried and found wanting. Perhaps it could cope with the occasional tort that arose in the horse and buggy age when the doctrine was born. But the injustices caused by this harsh doctrine are flagrantly exposed by the automobile which kills thousands and maims hundreds of thousands in America each year. More Americans were killed or injured by automobiles during the last fifty years than were killed or injured during both World Wars.

We have no adequate system to provide for this enormous number of civilian automobile accident casualties. Instead, we continue to use an archaic contributory negligence law, which was never designed for the automobile age, and which denies any relief whatever to great numbers of accident victims. Ofttimes, these unfortunates, together with their families, exhaust their savings and are thrown upon relief agencies or public charities. The social and economic havoc thus created cries out for legal reform with abrogation of such a barbaric doctrine.

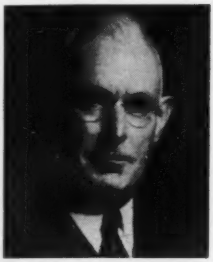
We believe comparative negligence would substantially solve the economic and social problems created by the accidents of the automobile age. Furthermore, its adoption would not change our judicial structure or interfere with our present free enterprise system of private insurance.

One argument made against comparative negligence is based upon the fear that its adoption might cause a large increase of insurance rates. This argument overlooks the fact that insurance

(Continued on page 140)

Bringing the Attorney into an Estate Planning Case

By William R. Spinney.*



William R. Spinney

THE topic upon which I am writing is a part of the very foundation of good relations between attorneys, accountants, life underwriters and trust officers. Without a proper handling of the initial relations with an attorney in initiating an estate plan, the relations with the attorney have every prospect of being bad. Yet, I have seen little discussion in print and heard little at meetings regarding this important aspect of estate planning teamwork.

I am writing from the point of view of the trust officer, the underwriter or the accountant who initiates an estate plan with his customer.

There are four situations which may confront the initiation of the estate plan.

(1) The property owner may have an attorney whom he is willing to retain for the job in hand.

(2) The property owner may have an attorney, but he may be uncertain as to whether or not he wants to retain him for the estate planning job.

(3) The property owner may have no attorney, and may know no attorney whom he wishes to retain.

(4) The property owner may have an attorney whom he intends to eventually retain, but he may decline to give the trust officer or the underwriter or the accountant authorization to contact the attorney during the initial stages of developing the estate plan.

Let us discuss these situations in the order in which they have been mentioned.

When the property owner has an attorney whom he is willing to retain, it should be the practice of the trust officer to suggest

*Assistant Trust Officer and Manager of The Estate Planning Division, Title Insurance and Trust Company. This article is based upon a talk given by the author before a departmental session of the 37th Annual Financial Public Relations Association Convention at Hotel del Coronado, San Diego, on October 20, 1952.

to the property owner at the first contact, or if the property owner is to be brought in contact with the trust officer by a life underwriter or by an accountant, to suggest to the underwriter or accountant that the attorney be invited into the first interview. If necessary, he should go further than suggest that the attorney be invited to sit in the first interview. He should urge that he be invited to sit in the first interview.

There are four reasons why this policy should be followed.

. In the first place it promotes good relations with the Bar and with the particular attorney with whom the trust officer is dealing at the time.

In the second place it impresses upon the property owner the fact that this is no casual conference, but a conference of the utmost importance.

In the third place it enables the trust officer to have in the first conference, which is usually a fact-finding conference, the attorney who frequently knows more about the property owner's affairs than the property owner knows himself. The attorney will frequently correct value estimates made by his client, who will frequently underestimate values on the peculiar psychological quirk that by deceiving his advisors he will reduce his taxes.

In the fourth place it enables the trust officer to familiarize an attorney, who is not familiar with estate planning procedures, and who does not ordinarily work in taxes, with the trust officer's methods of procedure, at the same time that the trust officer educates the property owner regarding the impact of taxes and the problems of estate conservation.

It should be realized that an underwriter working alone cannot bring an attorney into a first interview before he has aroused sufficient interest in his customer to motivate his customer in incurring an attorney's fee for the time consumed in sitting in an interview. If the life underwriter is, however, working with a trust company, and is endeavoring to set up the interview in the trust company offices, he can urge that the attorney be invited to sit in the first conference. In fact, the life underwriter's first interview with the property owner should be devoted to motivating the customer to want to enter the conference and to want to bring his attorney with him.

The trust officer should urge with equal emphasis, where he

(Continued on page 136)

The Continuing Partnership Whether and When

By Charles E. Millikan, Jr.*

Charles E. Millikan, Jr.

UNTIL income taxes became of major importance it was mainly of academic interest whether a partnership could continue after the death of a partner and whether the addition of new or different partners to a partnership would result in a new partnership or a continuation of the old (where the partnership business was continued).[1] The answers to these questions are now of great practical interest because they involve serious income tax consequences. The tax savings possible in properly preparing for the problem are surprisingly large. It is the purpose of this article to discuss the continuing partnership as governed by tax statutes and decisions, as well as by substantive partnership statutes and decisions, and to suggest several areas wherein tax advantage may be gained by use of continuing partnerships. Conversely, situations are discussed in which continuing partnerships should be avoided.

I. PARTNERSHIP LAW

Except for the method of holding title to partnership property,[2] certain rights of the partners in partnership property,[3] and creditors' rights,[4] the entity theory of partnership was not embodied in the Uniform Partnership Act.[5] A partnership is defined as an association of persons to carry on a business as co-owners for profit.[6] While many of the characteristics of the association

---

*Mr. Millikan took his A.B. and LL.B. degrees at the University of Southern California. He practices in San Marino and is associated with Reuel L. Olson.

[1]In some jurisdictions, prior to adoption of the Uniform Partnership Act Section 41 (Calif. Corp. Code sec. 15041), creditors of an old partnership, the business of which was continued by a new firm, did not have any priority or any right to partnership property in the hands of the new firm. For this reason unsatisfied creditors had an interest in proving partnership continuity, and to this extent the problem was not academic. See Freeman v. Huttig Sash & Door Co., 153 S. W. 122 (Texas 1913).

[2]Corp. Code secs. 15008(3), 15010, 7 U. L. A. secs. 8(3), 15.

[3]Corp. Code sec. 15025, 7 U. L. A. sec. 25.

[4]Corp. Code sec. 15041, 7 U. L. A. sec. 41.

[5]Original drafts of the Uniform Partnership Act clearly defined a partnership as an entity. See Commissioners' Prefatory Note, 7 U. L. A. 1-4; De Martin v. I. A. C., 90 Cal. App. (2d) 139, 202 Pac. (2d) 828 (1949); Deeney v. Hotel & Apartment Clerk's Union, 57 Cal. App. (2d) 1023, 134 Pac. (2d) 328 (1943); Park v. Union Mfg. Co., 45 Cal. App. (2d) 401, 114 Pac. (2d) 373 (1941).

[6]Corp. Code, sec. 15006(1), 7 U. L. A. sec. 6(1).

change immediately upon dissolution, the partnership does not become non-existent. The partners continue to hold the property as tenants in partnership and the business of the partnership is not directly affected, nor is it terminated until the partners, because of the duties involved in dissolution,[8] dispose of it in the process of winding up. While many of the rights and duties of the partners are left by the Uniform Partnership Act to be controlled by agreement between the partners, one thing is reasonably clear: in certain situations, such as the death of a partner, a dissolution will take place whether or not the partners may have agreed otherwise, and where there has been a dissolution there must be a winding up and termination of the partnership.[9] Winding up a partnership may mean liquidating the business by selling the assets, paying creditors and disbursing the proceeds to the partners, or it may mean continuing the business in some other manner together with settlement between the partners; unless the partners agree otherwise, the winding up must consist of liquidation of the assets, payment of creditors and disbursement of proceeds.[10] It should be emphasized that, under partnership law, an agreement allowing surviving or remaining partners to continue the business does not mean that there is not a dissolution or a winding up; rather, the winding up after dissolution consists of transfer of the going business to a successor consisting of a new partnership made up of some of the former partners. This is clearly illustrated when the business is continued by the sole surviving partner, where there obviously may not be a continuing partnership.

The question, in determining whether a particular partnership *continues* after a change in its personnel, is not whether the business was continued after the change, but whether the change

---

[7]Corp. Code, secs. 15029, 15030, 15033, 7 U. L. A. secs. 29, 30, 33; and see Commissioners' Notes to sec. 29, 7 U. L. A. 165.

[8]Corp. Code secs. 15037, 15038, 7 U. L. A. secs. 37, 38; Cotten v. Perishable Air Conditioners, 18 Cal. (2d) 575, 116 Pac. 2d 603, 136 A. L. R. 1068 (1941); Ellingson v. Walsh, O'Connor & Barneson, 15 Cal. (2d) 673, 676, 104 Pac. (2d) 507 (1940).

[9]Parish v. Bainum, 306 Ill. 618, 138 N. E. 147 (1923); Crane, *Partnership*, sec. 73 (1938); *cf.* Wood v. Gunther, 89 Cal. App. (2d) 718, 201 Pac. (2d) 874 (1949).

[10]Jay v. Clark, 85 Cal. App. (2d) 88, 192 Pac. (2d) 462 (1948); Dial v. Martin, 37 S. W. (2d) 166 (Tex. Civ. App., 1931); A partner who continues to operate the partnership business after dissolution without consent or agreement may be replaced by a receiver if his actions endanger partnership property, and any loss resulting from continued operation of the partnership business without consent or agreement must be borne by the surviving partner so continuing, plus interest on the value of the partnership assets as of the date of dissolution. If continued operation results in profits, the retiring partner or representative of the estate of a deceased partner may elect to take a share of the profits resulting from use of capital of the partnership. Corp. Code secs. 15038, 15042, 7 U. L. A. secs. 38, 42; Crane, *Partnership*, sec. 83 (1938); Treat v. Ogden, 56 Cal. App. (2d) 70, 132 Pac. (2d) 493 (1942); Siem v. Hjilm, 49 Cal. App. (2d) 148, 121 Pac. (2d) 87 (1942).

effected a dissolution of the partnership. Causes of voluntary dissolution are set forth in Corporations Code section 15031 and are reasonably specific.[11] Lacking however, is any mention of dissolution caused when a new partner is added or when an old partner retires. We know that dissolution is not caused by the assignment of partnership interests, unless the partnership agreement so provides.[12] In the event of assignment, the old partnership will continue until one of the events listed in Corporations Code sections 15031 or 15032 causes dissolution. The assignee, however, does not become a partner, by the assignment.[13] Until the assignee is accepted as a partner by the partners not assigning, his rights are extremely limited; he cannot join in the management, demand accountings, or even inspect the books,[14] and he will not have these rights until the non-assigning partners agree to accept him as a partner. When he is accepted the old partnership is dissolved and a new partnership formed.

It is reasonably certain, then, despite a few conflicting opinions, that any change in ownership of a partnership whereby the new owners may carry on the partnership business will result in dissolution, winding up and termination of the old partnership, as far as partnership law is concerned. It has been said, and undoubtedly will be said again, that dissolution, winding up and termination where the business is continued, are technical only. So to define dissolution and winding up where the winding up process does not include liquidation of the partnership assets, tends to cloud and confuse partnership termination procedure, and perhaps has had much to do with the conflict and confusion which we find in partnership tax cases.

II. TAX LAW

The determination of whether a partnership continues after a change in personnel of the partners has particular tax significance when a corporation, successor to the partnership, claims the partnership's earnings history in computing the income credit for ex-

---

[1] Corp. Code sec. 15031(a), 7 U. L. A. sec. 31(a), provides that a partnership will be dissolved when the term provided for its continuance expires. This provision is modified by Corp. Code sec. 15023, 7 U. L. A. sec. 23, so that no dissolution apparently will take place if the conditions set forth in section 23 are met.

[12] Corp. Code sec. 15027, 7 U. L. A. sec. 27; Hooper v. Barranti, 81 Cal. App. (2d) 570, 184 Pac. (2d) 688 (1947).

[13] Corp. Code sec. 15018(g), 7 U. L. A. sec. 18(g); Hazen v. Wariveck, 256 Mass. 302, 152 N. E. 342 (1926).

[14] Corp. Code sec. 15027, 7 U. L. A. sec. 27.

(Continued on page 146)

Divorce and Taxes

By the Committee on Taxation of the Los Angeles Bar.

(This is another in the series of brief statements intended as tax refresher notes for the assistance of lawyers in general practice.)

It is well known that lump sum alimony payments are not income to the wife or deductible by the husband. Likewise it is well known that periodic payments which meet the requirements of Section 22(k) of the Internal Revenue Code are taxable to the wife and are deductible by the husband under Section 23(u) of the Code. Even so, it may be helpful to call attention to the requirements of Section 22(k).

In order for the alimony payments to be deductible by the husband and taxable to the wife they must be received (1) after a decree of divorce or separation, and (2) in discharge of a legal obligation imposed under the decree or written instrument incident to the action. If the decree or written instrument requires payment of a principal sum designated as alimony, installment payments in discharge thereof do not come under Section 22(k) or Section 23(u) unless, by the terms of the decree or instrument, the principal sum is to be paid within a period of more than ten years from the date of such decree or instrument, and then only to the extent that the installment payment does not exceed ten per cent of the principal sum. But lump sum cash settlements (though included in the decree), temporary alimony paid prior to the decree and payments not required by the decree or written instrument incident to the action, do not qualify as alimony payments under the Internal Revenue Code provisions. Alimony payments payable over a period of less than ten years are not deductible by the husband or taxable to the wife, even though paid pursuant to a property settlement agreement incident to a divorce decree. *Estate of Orsatti,* 12 T. C. 188 (1949).

It is important to bear in mind that Section 23(k) does not apply to amounts payable under the terms of the decree or instrument for support of children. These amounts are not deductible by the husband or taxable to the wife. But a wife who pays more than one-half of the cost of supporting dependents from *taxable* alimony or her other funds is entitled to claim the exemptions for them provided other statutory requirements are also met.

The final comment must, of necessity, be in the form of a

general warning. All attorneys should be on the lookout for the other tax problems arising as a result of spouses' transferring property from one to another or relinquishing an interest in property, etc., as a means of effecting a property settlement in connection with a divorce or separate maintenance action.

For example, a husband and wife in California own a residence which cost $10,000 and now is worth $20,000 and stock of the husband's corporation which cost $10,000 and is presently worth $20,000 (both assets were acquired with "new" community property). They agree that the wife shall have the house and the husband the stock. Upon consummation of such an exchange the wife has a taxable gain of $5,000. She is transferring her community interest in the stock, which cost her $5,000, for the husband's community interest in the house, which has a value of $10,000. The gain would be long or short term, depending on how long the stock had been held. Of course, the husband will also realize a $5,000 gain.

Such tax problems are generally present in divorce and separate maintenance cases and should not be overlooked.

THOUGHTS OF COPYRIGHT

(Continued from page 118)

the author, artist and creator, *i.e.*, the right to the integrity of his work. Repeatedly, courts have protected a writer, creator or artist in forbidding a distorted version of his work to be published or exhibited. There is an instance in France when Anatole France, after he became famous, prohibited the publication of a work he had sold to a publisher some 30 years before upon reimbursing him of the amount paid. (Martin A. Roeder, 1940, The Doctrine of Moral Right, 53 Har. L. Rev. 554, 560.)

Other continental countries have recognized this right in its various aspects,

> "as the right of the creator to create, to present his creation to the public in any desired form or to withhold it, and to demand from everyone respect for his personality as creator and for his works." (Roeder, *op. cit., loc. cit.* p. 578.)

And there is a decree of the German Supreme Court in 1912 which forbade the purchaser of a mural to drape the nude figures which the artist had put into it.

There has been no recognition of this right in the United States. In 1948, four famed Russian composers, Dmitry Shostakovich, Aram Khachaturian, Serge Prokofieff and Nicolai Miaskovsky brought an action in the courts of New York against Twentieth Century-Fox Film Corporation to prevent the use of their music in a motion picture known as the "Iron Curtain," which depicted espionage by the representative of the Soviet Republic in Canada. The film ran for 87 minutes, during 45 of which music of the four plaintiffs was reproduced. The Supreme Court of New York denied intervention on the ground (a) that the music was not copyrighted, (b) that the use of the music could not be enjoined as a libel and finally, (c) that there was no violation of the moral right of the authors. Justice Edward R. Koch used this significant language:

> "The wrong which is alleged here is the use of plaintiffs' music in a moving picture whose theme is objectionable to them in that it is unsympathetic to their political ideology. The logical development of this theory leads inescapably to the Doctrine of Moral Right (53 Harvard Law Review). There is no charge of distortion of the compositions nor any claim that they have not been faith-

fully reproduced. Conceivably, under the doctrine of Moral Right the court could in a proper case, prevent the use of a composition of work, in the public domain, in such a manner as would be violative of the author's rights. The application of the doctrine presents much difficulty however. With reference to that which is in the public domain there arises a conflict between the moral right and the well established rights of others to use such works. Clemens v. Belford Clark & Co., *supra*. So, too, there arises the question of the norm by which the use of such work is to be tested to determine whether or not the author's moral right as an author has been violated. Is the standard to be good taste, artistic worth, political beliefs, moral concepts or what is it to be? In the present state of our law the very existence of the right is not clear, the relative position of the rights thereunder with reference to the rights of others is not defined nor has the nature of the proper remedy been determined. Quite obviously therefore, in the absence of any clear showing of the infliction of a wilful injury or of any invasion of a moral right, this court should not consider granting the drastic relief asked on either theory." (Shostakovich v. Twentieth Century-Fox Film Corp., 1948, 80 N. Y. Supp. (2) 575, 578-579.)

The Berne Convention gives full recognition to the "moral right" of the author. As revised at Rome in 1928, article 6 *bis* reads:

"(1) Independently of the author's copyright, and even after transfer of the said copyright, the author shall have the right to claim authorship of the work, as well as the right to object to any distortion, mutilation or other modification of the said work which would be prejudicial to his honour or reputation.

"(2) The determination of the conditions under which these rights shall be exercised is reserved for the national legislation of the countries of the Union. The means of redress for safeguarding these rights shall be regulated by the legislation of the country where protection is claimed." (As quoted in Copinger, *op. cit.*, p. 442.)

I believe that even without legislative action, by analogy to common law principles, a strong case could be made against distortion of an author's work. This might be as humble a start as the law of privacy had. Beginning as an assertion in 1890, in a law review article (Warren and Brandeis, 1890, The Right

of Privacy, 4 Har. L. Rev. 193), it has developed into a right now recognized in at least twelve states.

III.
THE "MANUFACTURING CLAUSE"

It is apparent from what has gone before that the strict limitation of the duration of the copyright and its division into an original and renewable term, under certain conditions, is traceable to a strict interpretation of the constitutional provision which enjoins the Congress to secure the rights of the author for a limited time only.

Behind it is the thought that the constitutional grant of power is an indication that the rights to be granted under it envisage the public inerest which they consider paramount.

By contrast, the other countries, including England, at the present time, view the problem strictly from the author's point of view.

The hesitancy of American courts to give recognition to the moral rights of the author, to which reference has just been made, indicates a like disinclination to approach the problem primarily from the author's standpoint. Personally, I believe that a single adequate term could be substituted and the authors be protected against distortion of their work without doing injury to the fundamental American concept. But, while the deficiency of our law, in these respects, is understandable, the presence of the manufacturing clause is difficult to defend.

We need not concern ourselves with the various changes which the law has undergone in this respect since the Act of March 3, 1891. Suffice it to say that in the form in which the provision appears at the present time, all the mechanical work from typesetting and printing to binding, with certain limited exceptions, must be done in the United States. (17 U. S. C. A., Secs. 13 and 16.) It is difficult to understand why the protection of an author should depend upon the place in which his book is manufactured. The usual defense that it is necessary to protect the printing and allied industries is as unrealistic as the tariff restrictions on importations of books in the English language which have plagued our publishing for a long time. Tying the right to copyright one's work or to circulate it in the United States to manufacture in the United States is, in effect, a burden on creation and dissemination of works of literature and art.

At the present time, the clause may bring about reprisals be-

cause, under the 1948 Revision of the Berne Convention, copyright protection may be refused by the countries working under that Convention to American authors if we fail to protect adequately the rights of authors of countries adhering to the Convention.

Representative Emanuel Celler, on May 10, 1951, introduced a bill (H. R. 409) modifying the manufacturing clause. Of the object of the bill Mr. Celler has stated recently:

> "My bill only removed the manufacturing requirements presently applicable to foreign books and periodicals in the English language. It did not change the present requirement that to secure copyright protection domestic books and periodicals in the English language must be printed and bound in the United States.
>
> "I felt the compromise adequately protected the interests of labor and the book-manufacturing industry, particularly in the light of the support given by the allied printing trades to similar legislation in the early Thirties." (New York Times, August 24, 1952, page 8E.)

This may be an auspicious change which will ultimately lead to the entire abandonment of the manufacturing clause. The United States is the only great country having such clause. The printing and allied trades of the United States are strong enough to abandon the requirement. Such abandonment would achieve great good-will for the United States among authors, writers and creators the world over. It should not be forgotten that, despite the insistence of many on the importance of a materialistic outlook, thinking is of paramount importance in the unfolding of our society. Indeed, like faith, it may, and does, move mountains.

These observations indicate that our attitude on copyright can stand improvement. It is for the courts and the practitioners in the field, as well as the legislators, to collaborate toward the end that, in harmony with social interests, the right of the writer, creator and author to disseminate his work in a manner and form consistent with his own artistic integrity be given fuller scope.

This would be in line with the constitutional aim to

> "promote the progress of * * * useful arts." (U. S. Constitution, Art. 1, Sec. 8.)

NOTE TO TEXT

1. The periods of copyright protections of countries belonging to the copyright union are:

Austria	50 years from death of author.
Belgium	50 " " " " "
Brazil	60 " " " " "
Bulgaria	30 " " " " " (30 years from publication in the case of anonymous, posthumous or popular works and where the owner is a corporation.)
Czechoslovakia	50 years from death of author.
Danzig	50 " " " " "
Denmark	50 " " " " "
Finland	50 " " " " "
France (and her protectorates)	50 " " " " "
Germany	50 " " " " "
Great Britain (and her colonies and protectorates)	50 " " " " "
Greece	50 years from death of author. (50 years from publication in case of posthumous works and 10 years from publication in case of translations.)
Haiti	Life of the author and his widow and 20 years more if there be children, 10 years if none.
Hungary	50 years from death of author.
Italy	50 years from death of author. (50 years from publication in case of anonymous and posthumous works, 20 years in case of photographs.)
Japan	30 years from death of author.
Liechtenstein	30 " " " " "

Luxembourg	50	"	"	"	"	"
Morocco	50	"	"	"	"	"
Monaco	50	"	"	"	"	"
The Netherlands	50	"	"	"	"	"
Norway	50	"	"	"	"	"
Poland	50	"	"	"	"	"
Portugal	50	"	"	"	"	"
Roumania	30	"	"	"	"	"
Spain	80	"	"	"	"	"
Sweden	30	"	"	"	"	"
Switzerland	30	"	"	"	"	"
Thailand (Siam)	30	"	"	"	"	"
Tunis	50	"	"	"	"	"
Yugoslavia	50	"	"	"	"	"

(Copinger, *op. cit.*, pp. 337, 338.)

Although the United States does not belong to the copyright union, nevertheless, through conventions, treaties and treaty proclamations, the benefits of these longer periods of copyright protection are extended to nationals of some of these countries, and reciprocally to nationals of the United States seeking copyright in these countries. The enumeration of the various durations shows clearly that the protection in the United States is among the shortest in the world.

"In the shifting legal climates of these stirring days, one of the few liberties left to the businessman is the privilege of 'cussing out' his lawyer when he advises him to change established ways of doing business that have proven commercially satisfactory and declared legal in the past. I have indulged in this profitless and wearing exercise myself, on occasions, but with advancing years I am learning to conserve my strength for more gainful occupations.

"I should admit, however, that the score over the years does not justify serious complaint. My company's lawyers have been well-fed, well-housed, and well-clothed during the four decades of our association. And I, as their client, have also managed to survive."—From an address by David Sarnoff, Chairman of the Board, Radio Corporation of America, to the Harvard Alumni Association of **New York City.**

Silver Memories

Compiled from the World Almanac and the L. A. Daily Journal of January, 1927, by A. Stevens Halsted, Jr.

A. Stevens Halsted, Jr.

Judges **Walton J. Wood** and **Elliot Craig** of the Los Angeles Superior Court have been assigned to Division One of the Second Appellate District. Judge Craig has been presiding in a criminal court. Judge Wood has served in various departments of the Superior Court, including that of presiding judge. He became nationally known as the first Public Defender in the United States, a position he filled until elected to the Superior Court in 1921.

* * *

J. George Ohannesian, for the last 3 years assistant United States Attorney, has resigned to become associated with the law firm of **Fredericks, Hanna & Morton. Emmett E. Doherty** will be his successor in the Federal post.

* * *

M. Miles Dodge has been appointed Assistant Secretary at Los Angeles to the Board of Governors of the new State Bar. Rated among the oldest active members of the Los Angeles Bar, Dodge was admitted to practice in 1908 after graduating from Harvard in 1902. Southern California offices for the recently formed State Bar are being opened in the Chester Williams Building.

* * *

There are 4027 lawyers in Los Angeles County of which 3388 are located in Los Angeles city.

* * *

A low tide on the east coast of England recently revealed for the first time a parish church 3 miles off Walton, covered

with shells and sea weed. It had been submerged over 525 years ago by erosion of the shore line of the sea.

* * *

Retiring from practice after 20 years as a member of the law firm of **O'Melveny, Millikin and Tuller,** attorney E. E. Millikin is retiring from practice and withdrawing his name from the firm. Judge **Louis W. Myers,** former Chief Justice of the California Supreme Court, has taken Millikin's place in the new firm name of **O'Melveny, Tuller & Myers.**

* * *

The Russian Soviet Government, headed by **Joseph Stalin,** has banished its opponents as follows: **Leon Trotsky** to Vierny on the Chinese-Turkestan frontier; **Leon Kamenoff** to Pensa; **Gregory Zinovieff** to Tambov; **Christian Rakovsky** to Astrakham; and **Karl Radek** to the Urals.

* * *

Following in his father's steps **Oscar A. Trippet, Jr.,** son of the late Judge **Oscar A. Trippet,** who was one of the best known federal judges in California, has just been admitted to the State Bar. He is now associated with the law firm of **Biby & Biby.** Trippet was admitted as the first candidate the Supreme Court has passed under its new plan of retaining direct control over all admissions to the State Bar.

* * *

An army airplane carrying 6 machine guns had its first tests in the air at Mitchell Field, L. I.

BRINGING THE ATTORNEY

(Continued from page 122)

has reason to believe that the situation is such that an accountant is concerned, that the property owner's accountant also be invited to sit in the first conference, along with the attorney. This is of greatest importance where corporation or intricate partnership fact matters are likely to come under discussion.

When the property owner has an attorney, but is not certain that he wants to retain him for the estate planning procedure, the trust officer should use extreme care never to influence the property owner away from his regular attorney. On the contrary, he should say to the property owner, "We prefer that you should

retain your regular attorney, and if you feel that he is not accustomed to working in this field, we suggest that you ask him to bring in associate tax counsel. Your regular attorney's familiarity with your affairs can be very valuable in formulating an estate plan. If he is not in the habit of working in taxes, there is no more reason why you should refrain from retaining him, along with associate tax counsel, than you would refrain from calling in your regular family physician if you suspected a heart condition. Your regular family physician will assist you in locating a good heart specialist and your regular physician's knowledge of your past physical history will be of great benefit to the heart specialist. The same situation exists with reference to your regular attorney and a tax attorney whom he brings in as an associate."

I am convinced that the underwriter's and the accountant's attitude in a similar situation should be the same as the attitude taken by a trust officer.

When the property owner has no attorney, the trust officer should always ask him if he knows an attorney whom he would like to use. If he suggests an attorney, the trust officer should always recommend that he retain that attorney, even though the trust officer does not know the attorney. I am definitely and absolutely committed to the basic principle that wherever possible the property owner select his own attorney uninfluenced by other advisors. If, however, the property owner says that he knows no attorney whom he wishes to retain, the trust officer can then lay before him the names, addresses and telephone numbers of five or more attorneys with whom the trust officer has worked, or whom he knows as professional men, whom he knows to be competent, honest and cooperative, and whose fee practices are likely to be in line with the customer's expectations of fees. If the property owner's expectations of fees are unreasonably low, the trust officer should tell him so and endeavor to build up his appreciation of the importance of having good legal counsel and in planting in his mind that good legal counsel is entitled to adequate fees. The trust officer can point out that attorneys live a hard, strenuous life; that they have heavy overhead expenses, and that their time and talent applied to their clients' affairs are their only source of revenue to meet their overhead and to adequately compensate them for years of preparation for their profession and for the heavy responsibilities which they carry. I believe that

trust officers, life underwriters, and accountants, should never overlook an opportunity to do this service for attorneys, because one of the vexations incident to law practice is the incapacity of laymen generally to appreciate the legitimate fee requirements of lawyers.

When the property owner has an attorney whom he intends to eventually retain, but he declines to give the trust officer permission to contact the attorney, the trust officer should size up the situation. He will usually come to the conclusion that the property owner is trying to work him for as much free advice as he can get and that he is attempting to use his attorney as little as possible, in order to cut down attorney's fees. The trust officer should not be willing to be a party to this procedure. He will be justified in giving the property owner something approaching a "Dutch Uncle" talk upon the lack of wisdom in keeping his attorney out of the picture and attempting to use him as a mere amanuensis to draft legal papers after estate planning has been completed. The trust officer should tell him that that procedure just plain doesn't work, and that he is definitely of the opinion that the attorney should be brought into the conference right away. If the property owner still persists in his "Scotch" approach to his attorney's services, the trust officer is justified in feeling that the property owner has no moral right to place him and the attorney in a situation where misunderstanding might arise. The trust officer, under these circumstances, will be justified in going to the attorney and saying something like this: "John Scotch, your client, is in contact with us regarding the creation of an estate plan. I have urged that you be called promptly into the conference, but he has declined to call you in until later and has declined to give me authorization to contact you. I feel, however, that he has no moral right to place either you or me in a position which might lead to misunderstanding. I feel that he is a layman and that he thinks like a layman. You are a professional man, and I am, I hope, at least semi-professional. You and I do not think in the same way that a layman thinks. Therefore, I have come to you in confidence to tell you of the existing situation and to say to you that I shall continue to influence your client to get you into active participation in the creation of an estate plan just as soon as I can induce him to do so. As soon as I have succeeded in persuading him to call you into

the conferences, I will lay before you a detailed record of all that has gone before, including everything that I have shown to or said to your client."

I, as a trust officer, do not recognize this as a violation of the confidence of the property owner, because I think he is on unsound moral ground, and I deny his right to put me in a position where I can be suspected of standing on that unmoral ground with him. After all, there are practical situations which demand a practical approach, let idealistic theories be what they may.

While I recognize that the trust officer is in a more advantageous position to carry out the principles which I have enunciated than that in which the life underwriter sometimes finds himself, I believe that the basic objective of the underwriter and of the accountant in their relations with attorneys should be the same as those of the trust officer. I believe that if these principles could be conveyed to accountants and life underwriters and that if accountants, life underwriters and trust officers generally adhered strictly to these principles, and if further than that, we made it generally known to attorneys that that was our attitude and our practice, many of the failures of cooperation on a mutual confidence basis, which now prevail among the members of the estate planning team, would vanish like dew before the sun. I do not believe that the members of the estate planning team will ever create satisfactory conditions among the members of the team by sharp criticism of each other, by litigation, or by coercive, so-called "treaties." The only proper function of a treaty is to define the respective functions of the team. It should be neither punitive nor coercive in character, but drafted in an atmosphere of mutual respect. The recent treaty between the American Bar Association and the American Society of Certified Public Accountants is an excellent example of such mutual respect.

For a long time, men of good will have been working together in effectively functioning estate planning teams. These men have devoted much time and energy and thought toward leading attorneys, accountants, life underwriters and trust officers generally into an atmosphere of mutual respect and confidence. Let those of us who have caught the vision never cease to work for the realization of such conditions as usual, and not exceptional, in the field of estate planning.

LET US ALL BE FRANK

(Continued from page 120)

rates are now determined almost entirely by the comparative negligence principle. This is true because over 95% of all claims are now settled before decision by a Court or jury, and every lawyer knows that in settlement negotiations we compare negligence and compromise liability. Such settlements are comparable to amounts that would be paid in settlements under comparative negligence. It is only after trial that the amount is either all or nothing. Inasmuch as more than 95% of the insurance dollar is now paid out on the comparative negligence principle, the use of comparative negligence for all cases would have only slight effect upon the total amount paid out by insurance companies and the resultant insurance rate.

This analysis is substantiated by the actual insurance rates in Wisconsin, where a modified comparative negligence law has been in effect for years. At present, the highest basic liability insurance rate for five and ten limits in Wisconsin is $41.00 as compared to $45.00 for the same highest basic rate in California where contributory negligence prevails. If comparative negligence contains a serious threat to insurance rates, would this not have been reflected noticeably in the Wisconsin rate during the past fifteen years? Furthermore, the adoption of comparative negligence by England in 1945 has not caused a noticeable change of insurance rates.

Opponents of comparative negligence contend that its adoption would increase litigation. However, the experience of Wisconsin and of England under comparative negligence proves exactly the contrary and shows that it tends to decrease litigation. The prob-

able explanation is that under comparative negligence, the opposing parties start settlement negotiations from closer starting points than exist under contributory negligence, and thus the chances of getting together on settlement without trial are proportionately increased.

It is also argued that "the teeniest-weeniest bit of negligence" does not defeat recovery and that, instead, it is the slightest contribution of any ordinary negligence as a proximate cause of the accident which bars recovery. As attorneys, we know that technically this is true, but we also know that, as a practical matter, juries do apply the "teeniest-weeniest bit of negligence" reasoning. Insurance attorneys can still argue such examples as the drop of ink in a glass of water, or the drop of bluing in a pail of water, or the dot of chalk within a large circle on the blackboard, and juries do not distinguish between the slightest amount of ordinary negligence and the slightest contribution of such negligence as a proximate cause of the accident. Even Judge Palmer in his examples falls into the same mental habit by referring to a driver as being 10% to blame for an accident without the further refinement regarding proximate cause.

It is also urged that comparative negligence would cause an increase in the padding of claims. It is difficult to attach much weight to such a contention. Of course, there are a dishonest few who now try to pad claims under contributory negligence and who would do the same under comparative negligence. However, the average person would not stoop to such a practice under comparative negligence, any more than he does now under contributory. Under either system, honest people would remain honest, and crooks would remain crooks.

It is said that an attorney employed on a contingent fee arrangement has a personal interest in the outcome of the case. Practically all attorneys have been employed at times under such contracts and know from personal experience that they give such clients services equal in quality, dignity, and understanding to those rendered all other clients. Furthermore, it is difficult to see how such a client risks "nothing or little, having nothing to lose and everything to gain," unless we are also prepared to say that medical expenses, hospital expenses, loss of wages, and pain and suffering amount to "nothing or little."

A novel argument advanced is that comparative negligence

might cause motorists to become more reckless. This argument apparently assumes that motorists now exercise more caution for fear they might not recover damages if contributorily negligent. Just why a driver would be negligent and invite injury to himself in order to collect only a part of his damages under comparative negligence has yet to be explained. If this argument is sound, then we should revoke the drivers' licenses of all people who carry large health and accident insurance policies, for fear they may become reckless in order to collect on their insurance.

Pursuing this line of reasoning further, would not comparative negligence encourage more careful driving on our highways since each motorist would know he would be held responsible for the consequences of his own careless misconduct regardless of the conduct of anyone else. Today, under contributory negligence, he can ofttimes drive carelessly with impunity by showing that someone else was also careless. Is this conducive to cautious driving?

In criminal law, we do not permit a robber to escape respon-

Bennett W. Priest—Issue Editor

sibility for his crime by showing that an accomplice assisted him in the robbery. Yet, today, a drunk driver can run down an old lady in a crosswalk and then escape all responsibility to her by showing that even though the old lady had the right of way she should have taken a second or third look and gotten out of the drunk driver's way. We are told that "the countenance of the law is indeed stern and purposeful" and that this result is necessary to maintain the "moral fibre" of our people. Presumably, this means the "moral fibre" of the old lady who was run down in the crosswalk. We who believe in comparative negligence are also concerned in doing something about the "moral fibre" of the drunk driver and of other negligent drivers who at present escape all responsibility for their wrongful conduct. Why should not the "countenance of the law be stern and purposeful" toward both parties to an accident instead of toward the victim alone?

It is also argued that comparative negligence would operate to the financial advantage of attorneys who specialize in personal injury work. There is good reason for believing it would do just the reverse. Contributory negligence creates a litigation hazard so serious that the legal services of personal injury specialists are in demand. Many general practitioners associate such specialists for their personal injury cases. If the hazard of contributory negligence is removed through adoption of comparative negligence, the general practitioner will tend to handle his own personal injury cases the same as any other part of his practice and the specialist will no longer be in such demand. Furthermore, no attorney would benefit unless his client, the accident victim, received a greater benefit.

However, this argument diverts attention from the real question, which is whether comparative negligence or contributory negligence is best fitted to serve society in the present automobile age. We should endorse the one which is best for society as a whole without regard to its financial effect upon the individual attorney, or the Bar as a whole.

It is argued that comparative negligence would be hard to administer because it is difficult to precisely apportion such an indefinite thing as negligence. This argument apparently ignores the fact that our present day juries who sit on Federal Employers Liability cases find no such difficulty in apportioning liability under comparative negligence. If we follow this line of reasoning,

then we should abolish all claims for unliquidated damages, and all claims for pain and suffering whether past, present, or future, because they are so indefinite and difficult to precisely evaluate.

Judge Palmer argues that "No one yet has expressed or even conceived a reason why John Jones, who was chiefly to blame for an accident that would not have happened if he had exercised only ordinary care, should have a cause of action against anyone else involved in the accident." If this blanket assertion is correct, then it would appear that no reason has ever been expressed or even conceived for all of the laws that provide for such causes of action in Admiralty, under Federal Employers' Liability, in the State of Mississippi, and in the countries of England, Canada, Australia, New Zealand, France, Germany, Spain, Italy, Norway and Sweden!

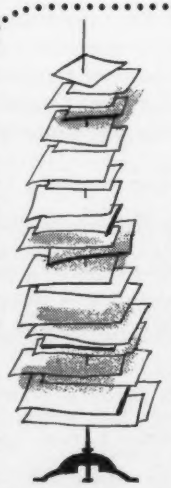
Opponents of comparative negligence argue that a person who is mostly to blame for an accident should not recover anything from one who is less to blame. An example is cited where you are 90% to blame and suffer $100,000.00 in damages in an accident where I am 10% to blame. Under contributory negligence you get nothing from me, but under comparative negligence, I owe you $10,000.00.

Let us analyze this example that is considered so terrible by those who wish to retain contributory negligence. Now, in order to have been damaged to the extent of $100,000.00 you undoubtedly have suffered horrible injuries such as blindness, or perhaps the loss of both hands, or of both feet, or you have a broken back with serious permanent disability. Under comparative negligence, you must bear 90% or $90,000.00 of this loss yourself. You desperately need to be paid the $10,000.00 damages which I caused to you in order to get medical and hospital attention. When you stand $90,000.00 of the loss, haven't you been penalized enough for your own negligence without also being forced to stand the additional $10,000.00 loss which I caused you? Why should I be permitted to walk away without paying for the damage I have caused to you? Is it not just to require that each person should pay damages in the same proportion that he is to blame in causing those damages?

Now let us turn the example around. You receive the same

terrible injuries and $100,000.00 in damages in an accident where you are 10% to blame and I am 90% to blame. Under comparative negligence you stand 10% of the loss or $10,000.00 which you caused, and I pay to you $90,000.00 or 90% of the $100,000.00 damage which I caused. But, under the present barbaric contributory negligence law, you must stand the entire $100,000.00 in damages and I go carefree of any responsibility even though I was 90% to blame and I caused $90,000.00 of your $100,000.00 loss. Is it really necessary that we preserve such a travesty of so-called justice in order to preserve the "moral fibre" of accident victims? Such a savage result may resemble a game or an athletic contest to some people, but to a bread winner with a broken back, or to a surviving widow with children, it is inhuman.

The thousands of victims of this injustice in our Courts are unorganized, silent and helpless. Their only voices are the attorneys who speak in their behalf. We do so sincerely, earnestly and without apology.



CONTINUING PARTNERSHIP

(Continued from page 125)

cess profits tax purposes.[15] It is also important in determining the basis for depreciation and the basis for gain and loss on assets held by a partnership continuing the business of an old partnership after a change in membership.[16] In these questions a beneficial result for the taxpayer may prescribe a continuing partnership in one situation and a termination and new partnership in another.

To gain tax advantages, partners will argue that the partnership continued through changes in ownership so a successor corporation can use a base period income credit for excess profits tax; partners will argue to the exact contrary if they want to qualify as a new corporation with ceiling rates on excess profits taxes. Partners will also argue that death of a former partner caused termination of the partnership when the stepped-up basis of the deceased partner's assets will allow larger depreciation deductions to the continuing partners; they will argue to the contrary when the continuing partnership sells capital assets, the basis of which is higher to the partnership than to the partners. Strangely enough, the partners might have their argument sustained in each case.[17]

The courts in tax cases generally have provided little reasoning in their holdings on the existence or nonexistence of a continuing partnership. For example, in *Robert E. Ford* the court states, "We think such argument ignores the fact that Congress has regarded the partnership as a separate entity for computing

---

[15]Internal Revenue Code sec. 461(a)(1)(D). See, for example, Ransohoff's, Inc., (1947) 9 T. C. 376.

[16]Internal Revenue Code sec. 113(a)(13), 26 U. S. C. A. 113(a)(13). C. C. H. 1952 Standard Fed. Tax Rep. par. 791.01 states the rule concerning partnership basis and partners' basis as follows:

". . . the basis of assets to the continuing partnership following a membership change may differ from the partners' bases of their old interests, depending upon whether or not a dissolution has been effected.

Where the amount paid to the retiring partner is less than his basis of the partnership assets, the basis of the continuing partnership will be decreased if there has been a dissolution. Conversely, if the amount paid is in excess of his basis of the partnership assets, the basis of the continuing partnership will be increased if a dissolution is effected."

See also C. C. H. 1952 Standard Fed. Tax Rep. par. 8659.

[17]Partnership continues:

First National Bank of Mobile v. C. I. R., 183 Fed. (2d) 172 (C. A. 5, 1950); U. S. v. Shapiro, 178 Fed. (2d) 459 (C. A. 8, 1949); C. I. R. v. Lehman, 165 Fed. (2d) 383 (C. C. A. 2, 1948); Henderson Est. v. C. I. R., 155 Fed. (2d) 310 (C. C. A. 5, 1946); Ransohoff's, Inc., (1947) 9 T. C. 376; Robert E. Ford, (1946) 6 T. C. 499.

Partnership terminates:

Guaranty Trust Co. v. C. I. R., 303 U. S. 493, 82 L. Ed. 973, 58 S. Ct. 673 (1938); C. I. R. v. Isidore Waldman, C. A. 2, April 15, 1952, C. C. H. 1952 Standard Fed. Tax Rep. par. 9283; Estate of Goldberg v. C. I. R., 189 Fed. (2d) 634 (C. A. 2, 1951); Renfro Drug Co. v. C. I. R., 183 Fed. (2d) 846 (C. A. 5, 1950); Carroll v. C. I. R., 70 Fed. (2d) 806 (C. C. A. 5, 1934); Darcy v. C. I. R., 66 Fed. (2d) 581 (C. C. A. 2, 1933); Hawaiian Freight Forwarders Ltd., (1950), 15 T. C. 35.

income taxes. Thus, when a capital asset is acquired or disposed of, the gain or loss is that of the computing unit and not of the individual partners."[18] It is interesting that the court cited no authority for these opinions. The United States Supreme Court apparently takes a different view of the intentions of Congress and has held that a partnership is a business unit which reports business income all of which belongs to the partners and not to the partnership, and which so reports the income to insure uniformity and prevent repetition in the partner's returns.[19]

In *Waddell and Co. v. Commissioner*[20] the court held that the death of a partner caused immediate vesting in his estate of an interest in each and every piece and parcel of the partnership property, while in *First National Bank of Mobile v. Commissioner*[21] the same court held that the estate of a deceased partner acquired only a partnership interest, as something separate and apart from partnership inventory and assets.

Another interesting decision is that in *Ransohoffs, Inc.*,[22] where the court in determining that a partnership continued after the death of a partner cited as authority California Civil Code section 2496, now Corporations Code section 15520, which is a section of the Uniform Limited Partnership Act not applicable to general partnerships, and contrary to the Uniform Partnership Act which was controlling.

We cannot expect the inconsistency of decisions of the courts in tax cases to be of particular assistance in guiding us to the steps to be taken to provide a continuing partnership, or to terminate a partnership when the business is continued. The only real guidance we find in tax decisions of the courts comes from the reasoning, in some of the cases, that the partnerships continued because the partners intended that result.[23] In order to achieve the intended result, either to continue or terminate the partnership, we must conform as closely as possible to substantive partnership law and provide for an adequate show of the partner's intentions.

III. PLANNING AND PROCEDURE

A. *When continuation of partnership is desirable.* When a partnership has a very substantial earnings record and incorpo-

---

[18] 6 T. C. 499 (1946).

[19] Neuberger v. C. I. R., 311 U. S. 83, 85 L. Ed. 58, 61 S. Ct. 97 (1940); Jennings v. C. I. R., 110 Fed. (2d) 945 (C. C. A. 5, 1940).

[20] 102 Fed. (2d) 503 (C. C. A. 5, 1939).

[21] 183 Fed. (2d) 172 (C. A. 5, 1950).

[22] 9 T. C. 376 (1947).

[23] See for example, C. I. R. v. Lehman, 165 Fed. (2d) 383 (C. C. A. 2, 1948); Ransohoff's, Inc., (1947) 9 T. C. 376; Robert E. Ford, (1946) 6 T. C. 499.

ration is contemplated, it will often be advantageous for the acquiring corporation to be able to use the earnings record of the partnership in computing the income credit for excess profits tax purposes. For this purpose the partnership should continue during the entire base period, or from the commencing of business[24] and the best way to insure this is to keep the partnership intact and transfer no partnership interests. If a partnership interest must be transferred prior to the incorporation, several procedures may be followed which would succeed in continuing the partnership. (The same procedures should be followed when one of the partners intends to sell his interest in the partnership, the basis of partnership assets is higher proportionately than the sale price of a partnership interest which is to be assigned,[25] and the partners desire to use the higher basis in determining gain or loss on transfers, rather than having the lower basis of the assigned interest transmitted to the partnership.[26]) These procedures include: (1) amendment of the articles of partnership, prior to assignment, to exclude any prohibition of assignment; (2) holding the partnership property in the name of the partnership and not in the partners' names; (3) after assignment not publishing a notice of dissolution, not executing new articles of partnership or filing a new certificate of fictitious name; (4) not transferring the partnership property to include the name of the assignee of the partnership interest, and not opening new books and records. The purchaser should carefully avoid any voice whatever in the management of the partnership, and should not require inspection of the partnership books, or do anything not available to an assignee as defined in Corporations Code section 15027, until such time as the incorporation may be completed or until the high basis assets have been sold by the partnership. If these steps are taken, the partnership will not have dissolved according to partnership law, and it would be extremely difficult, with any consistency at all, to hold that the partnership had dissolved according to tax law.

When the assignee of a partnership interest must engage in the partnership business immediately after assignment, the partnership articles, prior to assignment, should be amended to state clearly that assignment is not prohibited, and that the partnership

---

[24] Ransohoff's, Inc., (1947) 9 T. C. 376.

[25] The purchase price of the partnership interest will fix its basis. Internal Revenue Code sec. 113(a), 26 U. S. C. A. 113(a); see note 16 *supra*.

[26] *Cf.* Carroll v. C. I. R., 70 Fed. (2d) 806 (C. C. A. 5, 1934); Robert E. Ford, (1946) 6 T. C. 499.

will continue uninterruptedly after the assignment and the assignee will be a partner upon assignment, and that his rights will be governed in the same manner as were those of his assignor. The partnership property should be held in the name of the partnership and not in the names of the partners. The partners should not, after assignment, publish a notice of dissolution or transfer the partnership property to include the name of the new partner and should not execute new articles of partnership, or open new books. Because recognition of a new partner may only result after dissolution of the old partnership according to partnership law, this latter procedure is not as certain of success as where the assignee does not become a partner until after the purpose has been served.

If, while all the original partners are living, incorporation is planned for some future time, some steps may be taken to continue the partnership after the death of a partner so as to retain a continuous base period for excess profits tax purposes in the event a partner should die before incorporation may be completed. The same steps should be taken during periods when the basis of partnership assets is higher than the market value of the assets or the agreed purchase price for a deceased partner's interest in the partnership;[27] this will enable the surviving partners to continue to depreciate the partnership property from its higher basis or use the higher basis in determining gain or loss on transfers, rather than having the lower basis of the deceased partner's interest transmitted to the partnership.[28] Such steps include a statement in the articles of partnership or in the partnership purchase and sale agreement that death of a partner will not affect the partnership business or require any cessation of its operations, but will allow the surviving partners to purchase the deceased partner's interest or accept the heirs of the deceased partner in the place of the deceased partner; also, a further statement that the articles will govern the surviving partners for the remaining term of the partnership. The surviving partners should not draw new articles of partnership, the partnership property should be held in the partnership name, not in the name of the partners, and should not be transferred to show

---

[27]The market value of a partnership interest at the date of death of a partner determines the basis for that interest. I. R. C. 113(a)(5), 26 U. S. C. A. 113(a)(5); *cf. First National Bank of Mobile v. Commissioner,* 183 Fed. (2d) 172 (C. A. 5, 1950).

[28]See notes 16, 20 and 22 *supra.*

change of ownership after the death of a partner, a notice of dissolution should not be published, and the books should not be closed and new books opened. If the same result is desired but the need is not apparent until after death of a partner has occurred, as many of the aforementioned steps should be taken as are possible under the circumstances.

Planning for a particular partnership interest sale transaction in addition to planning for the eventual death of a partner will include a combination of the above procedures where possible.

B. *When termination of partnership is desirable.* When the market value of the partnership assets is higher than the partnership basis of those assets, or a partner sells his partnership interest for an amount in excess of the partnership basis, it will be of advantage to the partners to cause the termination of the old partnership and to form a new partnership in order to be able to deduct larger amounts for depreciation and to realize a smaller taxable profit on the sale of inventory and other capital assets in the course of business. Also, where a corporation will acquire a partnership it may be beneficial to qualify as a new

corporation, with a consequent ceiling on excess profits taxes for the first five years of operations,[29] rather than to use the earnings record of an old partnership. Any period prior to acquisition during which the acquired partnership was in existence will be considered one of the five years[30] and it is therefore essential that the acquired partnership should have been in existence as short a time as possible. If the new corporation excess profits tax ceilings are advantageous, the partners should cause termination of the old partnership and form a new partnership whenever a partner's death occurs or whenever a partner transfers his partnership interest. To cause termination of the partnership where there is an *inter-vivos* transfer of a partnership interest, the non-assigning partners should expressly state that a dissolution has occurred, publish notice of dissolution, have an accounting and close the partnership books, form a new partnership by executing new articles of partnership, file and publish a new certificate of fictitious name, transfer the assets from the old partnership to the new partners, and in every other possible manner indicate that the old partnership ceased and a new partnership has been formed. When death of a partner is involved, the old articles of partnership should clearly indicate that death will cause dissolution, and, if the surviving partners have the right to purchase the deceased partner's interest, the articles of partnership or the purchase agreement should not state that the surviving partners have the right to continue the business; rather they should state that the surviving partners have the right (or obligation) to wind up the business in any manner they see fit within agreed time limits, and to pay to the estate of the deceased partner whatever amount is agreed. If the heirs of the deceased partner have a right to take an interest in the partnership and become

---

[29]Internal Revenue Code sec. 430(e)(1), 26 U. S. C. A. 430(e)(1).

[30]Internal Revenue Code sec. 430(e)(2), 26 U. S. C. A. 430(e)(2). The Treasury Department takes the position that I. R. C. sec. 430(e)(2) applies not only to predecessor corporations but also to predecessor partnerships and sole proprietorships, even though the language of the subsection applies only to corporations. The opinions stated in this article are based on the position of the Treasury Department in this regard, even though the position is questionable. If the subsection is applied as it is written, a corporation which has acquired a partnership or sole proprietorship having sufficient duration to provide a base period income credit may use the income credit to its full extent and then apply the ceilings provided in I. R. C. sec. 430(e)(1) to the tax so determined. I. R. C. sec. 430(e)(2) does not apply in this manner to corporations which have acquired their assets from another corporation, in which case either the ceilings provided in I. R. C. sec. 430(e)(1) or the base period income credit based on earnings of the predecessor corporation as provided in I. R. C. sec. 462 may be used. Taxpayers who are willing to contest the position of the Treasury Department in order to gain the benefit of ceilings and average base period income credit should use the procedures outlined in this article to continue the partnership after death of a partner or transfer of a partnership interest. Due consideration should be given to I. R. C. sec. 430(e)(2)(B)(iv) and to a possible retroactive amendment of the subsection before this plan is followed.

partners, the heirs should be treated in the same manner as new partners in *inter-vivos* transfers. The surviving partners of a deceased partner, and the heirs of a deceased partner if they are involved, should also do each of the things listed above for *inter-vivos* transfers. If these steps are taken, the partnership will have dissolved and terminated according to partnership law, and the partners will have intended so to do in accordance with tax law.

It must be remembered that dissolution and termination of the partnership should involve closing of the books of the old partnership and could cause more than 12 months partnership income to be taxed in one year to the partners, where the partners and the partnership report income on different accounting periods.[31] The Commissioner has apparently not yet decided to argue seriously that surviving partners or non-assigning partners must close their accounting period and report income for a full year, plus the portion of the following year ending with dissolution, when death or changes in partnership personnel cause a dissolution.

[31]Mary D. Walsh, (1946) 7 T. C. 205. The decisions are not uniform where income in the last return of a deceased partner is involved. *See* C. I. R. v. Mnookin Estate, 184 Fed. (2d) 89 (C. A. 8, 1950); *contra,* C. I. R. v. Waldman, C. A. 2, April 15, 1952, C. C. H. 1952 Standard Fed. Tax Rep. par. 9283.

This writer believes so to require would be consistent with partnership law and with some of the decisions of the courts in partnership tax cases. It may be well to consider whether the advantage gained by delaying income until a subsequent year through adoption of a partnership accounting year different from that of the partners is worth the liability which might occur if a partner, or three or four partners, were required to pay in one year the income tax on more than twelve months income.

It should also be remembered that Treasury Regulations 111, 29.3797-4 set two criteria for the determination of whether a partnership should be taxed as a corporation. The first of these criteria involves the transferability of partnership interests and the continuation of a partnership after death of one of the partners. If the intention of the partners is to maintain a continuing partnership, the partners should carefully avoid coming within the terms of the second criteria, involving management; they should be particularly careful to avoid control of partnership affairs proportioned on percentage of partnership interest, should avoid meetings of partners similar to meetings of directors of a corporation, with a chairman presiding, or with formal minutes of meetings, and should conform to accounting methods and procedures generally used by partnerships.[32]

C. *Conclusion.* Some may argue that the distinctions between continuing and terminating partnerships will not result in the tax advantages indicated, because the partners have the choice of continuing or terminating the partnership. In reply to a similar argument the Court in *Herbert v. Riddell,*[33] declared (quoting from *Commissioner v. Kolb*[34]), "Where for legitimate business purposes a person has a choice of conducting his business transactions without tax liability, such a liability does not arise simply because it would have arisen if another process had been chosen." If the processes outlined are used as a basis, are improved and modified to fit each particular situation, and then are implemented by the partners' actions and dealings in conducting the partnership business, particularly in transactions with creditors and customers, any contestant of the intended result will have a formidable obstacle to overcome in order to succeed.

---

[32]*See* J. A. Riggs Tractor Co., (1946) 6 T. C. 889.
[33]103 Fed. Supp. 369, 383 (D. C. S. D. Calif., 1952).
[34]100 Fed. (2d) 920 (C. C. A. 9, 1938).

art-
art-
ad-
ugh
of
ner,
the

11,
art-
nese
and
art-
ning
the
ould
pro-
void
rpo-
of
oce-

be-
in
oice
ilar
rom
oses
ith-
use
the
fied
the
usi-
ers,
ob-

This writer believes so to require would be consistent with partnership law and with some of the decisions of the courts in partnership tax cases. It may be well to consider whether the advantage gained by delaying income until a subsequent year through adoption of a partnership accounting year different from that of the partners is worth the liability which might occur if a partner, or three or four partners, were required to pay in one year the income tax on more than twelve months income.

It should also be remembered that Treasury Regulations 111, 29.3797-4 set two criteria for the determination of whether a partnership should be taxed as a corporation. The first of these criteria involves the transferability of partnership interests and the continuation of a partnership after death of one of the partners. If the intention of the partners is to maintain a continuing partnership, the partners should carefully avoid coming within the terms of the second criteria, involving management; they should be particularly careful to avoid control of partnership affairs proportioned on percentage of partnership interest, should avoid meetings of partners similar to meetings of directors of a corporation, with a chairman presiding, or with formal minutes of meetings, and should conform to accounting methods and procedures generally used by partnerships.[32]

C. *Conclusion.* Some may argue that the distinctions between continuing and terminating partnerships will not result in the tax advantages indicated, because the partners have the choice of continuing or terminating the partnership. In reply to a similar argument the Court in *Herbert v. Riddell,*[33] declared (quoting from *Commissioner v. Kolb*[34]), "Where for legitimate business purposes a person has a choice of conducting his business transactions without tax liability, such a liability does not arise simply because it would have arisen if another process had been chosen." If the processes outlined are used as a basis, are improved and modified to fit each particular situation, and then are implemented by the partners' actions and dealings in conducting the partnership business, particularly in transactions with creditors and customers, any contestant of the intended result will have a formidable obstacle to overcome in order to succeed.

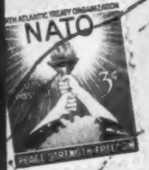
---

[32]*See* J. A. Riggs Tractor Co., (1946) 6 T. C. 889.
[33]103 Fed. Supp. 369, 383 (D. C. S. D. Calif., 1952).
[34]100 Fed. (2d) 920 (C. C. A. 9, 1938).

rt-
rt-
ad-
gh
of
er,
the

11,
rt-
ese
and
rt-
ing
the
uld
ro-
oid
po-
of
ce-

be-
in
ice
lar
om
ses
th-
use
the
ied
the
usi-
ers,
ob-



MRS. MARIAN G. GALLAGHER F.U.L.
LAW LIBRARIAN
UNIVERSITY OF WASHINGTON
SEATTLE 5, WASHINGTON